which I have already dealt. All these other grounds are equally without any merit. I would like to state in conclusion that I have read through the record of appeal in this case many times. I have given very careful thought to all the arguments put forward by Mr. Marshall on behalf of the appellant with his usual thoroughness and persuasiveness, but I am compelled to say that the conviction of the appellant was neither wrong in law nor against the weight of the evidence. I must therefore dismiss the appeal against conviction. The appeal against sentence is also dismissed because I do not consider it in any way excessive.

Appeal dismissed.

PUBLIC PROSECUTOR v. YONG NAM SENG & ANOR.

[A.Cr.J. (Azmi J.) January 12, 1964]

[J.B. — Criminal Appeal No. 22 of 1963]

Customs and Excise—Dutiable goods—Incorrect declaration of—Alternatively failure to declare—Goods required by the Army—Exemption from duty under Customs Duties Exemption Order, 1959—Exemption form endorsed by Army authorities but signed by first respondent as importer—Goods supplied by second respondent—Question as to who was importer—Declaration signed at Singapore—Declaration presented at Johore Bahru customs gate—Whether within jurisdiction of Court at Johore Bahru.

Customs Ordinance, 1952, s. 129(1)—Observations.

One W.H. Ltd. contracted with the Army to carry out certain works at Terendak Camp, Malacca and in respect of the said works required plate glasses (dutiable goods) which had to be imported from Singapore. The Army authorities endorsed a declaration form claiming exemption from duty (under Customs Duties Exemption Order, 1959) showing the quantity of plate glass required and sent it to the W. H. Ltd. in Singapore. The declaration form was signed in Singapore by the first respondent who was at all material times the director of W. H. Ltd. The form was then sent to A. G. & Co. who supplied the glass. A. G. & Co. through the second respondent packed and handed the glass together with the declaration form to a transport company for transportation to Malacca. At the Johore Bahru customs gate it was found that the quantity of plate glasses was considerably in excess of the quantity shown in the declaration form. The respondents were charged under section 129(1)(a) and alternatively under section 129(1)(e) of the Customs Ordinance. The learned magistrate acquitted both respondents because he was of the view that the importer was A. G. & Co. and not the respondents. On appeal by the Public Prosecutor;

Held: (1) the first respondent as director of W. H. Ltd. signed the declaration form which he knew was a declaration of dutiable goods. Having put forward himself as the importer by signing the declaration he was responsible for the actual quantities described in the form which was prepared by his agent in Malacca;

(2) the signing of the declaration form at Singapore and its presentation at Johore Bahru was a continuous act culminating in an act committed within the jurisdiction of the Court at Johore Bahru.

Observations on what the prosecutor need prove under section 129(1) of the Customs Ordinance.

Cases referred to:—

(1) *Lee Szu Yin* v. *Public Prosecutor* [1962] M.L.J. 49.

(2) *R.* v. *Oliphant* [1905] 2 K.B. 67.

(3) *R.* v. *de Marny* [1907] 1 K.B. 388.

CRIMINAL APPEAL.

Wan Hamzah bin Mohd. Salleh (Deputy Public Prosecutor) for the appellant.

J. F. McWilliam for the respondents.

Cur. Adv. Vult.

Azmi J.: This is an appeal by the learned Public Prosecutor against the acquittal of both respondents by the learned Magistrate in Johore Bahru. The respondents were charged as follows:

"That you (1) Yong Nam Seng and (2) Ahamedkhan s/o Ibramkhan at about 10.30 a.m. on 3.7.63 at the Customs Import Bay, Johore Bahru, did make a declaration required by the Customs Ordinance, 42/52, which declaration was incorrect in that it stated in items 1, 2 & 3 in the said declaration that the goods were 296 pieces, 234 pieces and 8 pieces of glass respectively whereas in truth and in fact the goods were found to be 593 pieces, 468 pieces and 9 pieces of glass respectively and that you thereby committed an offence under Section 129(1)(a) and punishable under Section 129(1)of the Customs Ordinance, 42/52."

and in the alternative as follows:

"That you (1) Yong Nam Seng and (2) Ahamedkhan s/o Ibramkhan at about 10.30 a.m. on 3.7.63 at the Customs Import Bay, Johore Bahru being required by Section 75 of the Customs Ordinance 42/52 to make a declaration of dutiable goods to wit, 297 pieces 24" x 6" glass, 234 pieces 32" x 6" glass and 1 piece 36" x 24" glass, total 532 pieces of glass, imported by you, did fail to make such declaration thereby committing an offence under Section 129(1)(e) and punishable under Section 129 of the said Ordinance."

The facts for the prosecution case may be summarised as follows:

Messrs. Woh Hup Ltd. of Singapore had a contract to construct a fire station and other works in the Malacca Terendak Camp for the Army and for this purpose required certain amount of plate glasses which had to be imported from Singapore. These plate glasses are dutiable goods but since these articles were required for the Army, they were not subject to any import duty.

The Army Quantity Surveyor, P.W.1, stated that he endorsed the declaration, Exhibit P.1, on June 17, 1963 at Malacca. It was a term of the contract between the Army and Woh Hup Ltd. that the importation of materials required for the contract was to be the company's responsibility.

The certificate signed by the Surveyor claimed exemption from duty under the Customs Duties Exemption Order, 1959. The declaration form itself is described as a "Declaration of Dutiable Goods Imported at Johore Bahru" and there is a note to the effect that the declaration must be submitted in triplicate by the importer (the present owner of the dutiable goods) or his authorized agent. It would be seen, therefore, that the form was signed by the director of Woh

Hup Ltd. as the importer. On this point I might refer at this stage to the admission made by the 1st respondent himself that the army insisted that he must sign the declaration and that the company was responsible for the importation of the material and, if the materials are dutiable, the duty shall be payable by the Army.

Among the articles stated in the declaration form were as follows:

Item 1 24" x 6" obscure and clear sheet plate glass — 296 pieces.

Item 2 32" x 6" obscure and wired plate glass — 234 pieces.

Item 3 32 oz. clear polished plate glass (36" x 24") — 8 pieces.

These goods were to be supplied by a sub-contractor, Abdul Ghani & Co., Singapore.

The declaration, Exhibit P.1. was subsequently signed at Singapore on June 26, 1963 by the 1st respondent who was at all material times a director of Woh Hup Ltd.

On the day the goods were to be brought into Malaya a transport company of Malacca, who had a branch in Singapore, was ordered to transport all the articles stated in the declaration, including the three types of glasses enumerated above. The driver of the lorry belonging to the transport company by a previous arrangement went to the 2nd respondent's premises and collected altogether six cases of glasses. After the goods had been loaded the 2nd respondent on behalf of Abdul Ghani & Co. handed the declaration P.1 to the driver of the lorry. After reporting back to the clerk at the transport company's premises the driver proceeded with his conductor on his way to Malacca with the six cases in the lorry.

When he arrived at the customs gate at Johore Bahru he produced the declaration, Exhibit P.1, for examination by the customs revenue officers. On examination the customs revenue officers found that there were altogether:—

Item 1 — 593 pieces instead of 296 pieces as stated in the declaration.

Item 2 — 468 pieces instead of 234 pieces as stated in the declaration.

Item 3 — 9 pieces instead of 8 pieces.

These goods were dutiable and the duty on the goods in excess of the quantities stated in the declaration were valued at $361.95 and the duty would be $90.49.

According to the 1st respondent, he signed the declaration form with all the particulars in the form already filled in by his employee in Malacca. The form was handed to Abdul Ghani & Co. who supplied the materials and apparently Abdul Ghani & Co., through the 2nd respondent, having packed a quantity of material, handed the material and the form to the transport company, and the transport company's employee, the lorry driver, transported the material together with the form to the customs gate at Johore Bahru.

The 2nd respondent's case was that he supplied the materials according to the particulars given to Abdul Ghani & Company's agent in Malacca which would appear to correspond to the quantity actually packed and handed over to the transport company. He apparently never checked the quantities again with the declaration form.

The learned trial Magistrate acquitted the 1st respondent because he was of the opinion that Abdul Ghani & Co. was the importer and should be charged and not the 1st respondent. For these reasons he acquitted both the respondents.

The learned Magistrate in his grounds of decision quoted the definition of "importer" given in the Ordinance and then held that Abdul Ghani & Co. were the true owners. The Magistrate appeared to come to this conclusion because he found that Abdul Ghani & Co. was a sub-contractor to Woh Hup Ltd. for the supply of the glass material and he therefore said that he was satisfied that the actual person or persons responsible for the importation of the glass sheets at the material time were Abdul Ghani & Co.

The learned Magistrate in my opinion had failed to consider the fact that under the terms of the contract with the Army, Woh Hup Ltd. were responsible for the importation themselves and the fact that the Army insisted that a director of Woh Hup Ltd. should sign the importation declaration form. To my mind Abdul Ghani & Co. were merely the suppliers of the glass materials.

The learned Deputy Public Prosecutor in his grounds of appeal urged that both of the respondents were the importers of the goods and that the 1st respondent is liable under the first charge for making a declaration which is untrue or incorrect in certain particulars, and that both the respondents were liable for failing to make a declaration under the alternative charge.

The learned Deputy Public Prosecutor urged me to distinguish between the act of signing a declaration and making it, and he submitted that the declaration was made when it was presented at a customs gate, as required by the proviso to section 75(1).

Mr. McWilliam cited to me the case of *Lee Szu Yin* v. *Public Prosecutor*.[1] Ong J. held in that case that the defendant signed the declaration form in question in Singapore, and therefore the *actus reus* having taken place in Singapore, the doer, therefore, cannot be convicted for delivering a false or fictitious invoice

which he has sold to a customer. The learned judge also cited the case of *R.* v. *Oliphant* [2] and *R.* v. *de Marny.*[3] The learned judge distinguished the case before him with the two English cases referred to. This is what he said:

"The distinction to be drawn between those cases and the instant one is that in the former the portion of the act which was done abroad formed one continuous act with its culmination in the criminal act committed within the jurisdiction, whereas here the making of the undervaluation and declaration were entirely independent acts done by a third party of his own volition."

In my opinion I would say in the case before me Woh Hup Ltd. was interested in the importation of the goods in question from Singapore to Malacca. It was its responsibility as required by its contract with the Army. I say this because the 1st respondent said that the Army insisted that he should sign the declaration form. I can only draw from that that the Army insisted that Woh Hup Ltd. should do the importation. It cannot be disputed that Woh Hup Ltd.'s director signed the declaration which he knew fully well was a declaration of dutiable goods to be imported through Johore Bahru, and that that form had to be submitted by the importer or his authorised agent there. The 1st respondent having put forward himself as the importer by signing the declaration, particulars of which were prepared by his agent in Malacca, should be responsible that the actual quantities described in the form should be packed and transported into Malaya.

In my opinion, having regard to the facts of this case, I have no doubt that the signing of the form in Singapore and the presentation of the form at Johore Bahru is a continuous act culminating in an act committed within the jurisdiction of the Court at Johore Bahru, and I also say, on the facts of the case, that the attempt to import the goods at Johore Bahru was done on behalf of Woh Hup Ltd. For the purpose of section 129(1) of the Customs Ordinance it is sufficient for the prosecution to prove that a declaration has been made and that the particulars in such declaration are untrue or incorrect. In my opinion, therefore, the magistrate should have convicted the 1st respondent on the first charge. The acquittal against the 2nd respondent in reference to the first and alternative charge stands. I set aside the order of acquittal on first charge against the 1st respondent and order a retrial by the President, Sessions Court.

Re-trial ordered.

Solicitors: *Wong & Paramjothy.*

TAY KHENG HONG v. HEAP MOH STEAMSHIP CO. LTD.

[O.C.J. (Ambrose J.) May 28, 1960]
[Singapore — Suit No. 443 of 1959]
[C.A. (Tan Ah Tah, Buttrose & Wee Chong Jin JJ.) September 30, 1960]
[Singapore — Civil Appeal No. 8 of 1960]
[P.C. (Lord Jenkins, Lord Morris of Borth-y-Gest & Lord Guest) January 14, 1964]
[Privy Council Appeal No. 17 of 1961]

Practice and Procedure—Appeal—Principles on which appellate court may interfere with lower court's findings of fact—Trial judge accepting plaintiff's evidence and refusing to believe that of defendants' witness—No ground for setting aside decision based on credibility.

Agents contracting for foreign principals—Lighterage custom in Singapore—Presumption of personal liability.

The appellant sued the respondents for the sum of $30,711.60 being demurrage under an oral contract. The appellant gave evidence that on October 18, 1958 he and one G.L. acting on behalf of the respondants had made a verbal contract whereby the appellant was to act as the lighterage contractor of the respondents. Rates of payments were agreed between the parties including demurrage of 60 cents per ton. Pursuant thereto, the appellant transhipped cargoes of rice from two steamers which had arrived in Singapore on October 21 and November 27, 1958 respectively. The respondents paid the appellant $71,128.71 for lighterage, towing and stevedoring of these two cargoes.

G.L. gave evidence for the respondents denying that he had ever discussed rates and conditions of lighterage with the appellant. The respondents denied that any contract for lighterage had ever been made between them and the appellant. The trial judge accepted the appellant's evidence that he and G.L. had made an agreement in the terms narrated. The appellant impressed the judge as a simple honest and straightforward witness. The trial judge refused to accept G.L.'s evidence as truthful.

The Court of Appeal found that there was a considerable volume of independant evidence both documentary and oral which was consistent only with the respondents' case. The Court of Appeal therefore held that the trial judge was wrong in accepting the appellant's evidence. On appeal to the Privy Council,

Held: (1) in so far as the trial judge's decision was based on the credibility of the appellant and G.L. this was the finding of a specific fact that an agreement was reached between them, thus depending on the evaluation of their evidence as witnesses;

(2) the Court of Appeal's acceptance of the evidence of G.L. depended on inferences from documents, but these inferences were not sufficient to reinstate G.L. as a reliable witness in the face of the trial judge's refusal to accept his evidence as truthful and accordingly there was not sufficient material before the Court of Appeal to entitle them to reject the result arrived at by the trial judge.

Cases referred to:—

(1) *Rusholme Ltd.* v. *S. G. Read Ltd.* [1955] 1 All E.R. 180, 183.

(2) *Brandt* v. *Morris* [1917] 2 K.B. 784, 797; [1916-17] All E.R. Rep. 324.

(3) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

(4) *Watt or Thomas* v. *Thomas* [1947] A.C. 484, 487, 488; [1947] 1 All E.R. 582.

(5) *Clarke* v. *Edinburgh & District Tramways Co. Ltd.* [1919] S.C. (H.L.) 35, 37.

(6) *Jacker* v. *International Cable Co. Ltd.* (1888) 5 T.L.R. 13.

(7) *Gilbert* v. *Endean* (1878) 9 Ch. D. 259.

SUIT.

K. E. Hilborne for the plaintiff.

K. Gould for the defendants.

The case was tried by Ambrose J. who delivered the following judgment:

Ambrose J.: In this suit the plaintiff, who is a lighterage contractor, seeks to recover demurrage amounting to $30,711.60 from the defendant company under an oral contract alleged to have been made between the parties on or about the 18th October, 1958.

The first question to be decided is whether the alleged contract was made between the parties. The plaintiff's evidence is to this effect. About the middle of October, 1958, he was informed by one K. K. Khoo that there was a consignment of rice for transhipment. The following day Khoo took him to the defendants' office, where he met Goh Leh, the manager of their shipping department. There was an Indonesian gentleman present. Goh Leh said that he wanted to give the plaintiff a contract for transhipping rice, that the plaintiff was to do the lightering, stevedoring, towing and sewing of bags, and that the ship would be arriving in two days' time. He asked the plaintiff to make the charges as reasonable as possible. The charges quoted by the plaintiff were these:

$2.25 per ton for lighterage,
.70 per ton for demurrage,
$1.40 per ton for stevedorage,
.12 per ton for towing, and
$5.00 per man per day for sewing bags.

Goh Leh accepted the last three charges. He offered $2.10 per ton for lighterage and 60 cents per ton for demurrage. The plaintiff accepted the counter-offers. The terms were not put in writing.

The evidence of Goh Leh is a follows. A few days before the 20th October, 1958, he was given a vague idea by Haalebos, the managing director of the defendant company, that a shipment of rice was expected. On the 20th October, he was told by Haalebos about the arrangements made with Aus Suriatna, Director of Indonesia Sugar Line and Indonesia Samudera Line. The Sugar Line operated the "Planet" and the Samudera Line operated the "Incharran." On the same day he received information that the "Planet" was due to arrive that day with 9,000 tons of rice for transhipment to Indonesia. He received a memorandum from Haalebos as to the arrangements a few days later. The memorandum is undated and unsigned. It states in effect:

(1) that the defendants are to act as husbanding agents for the "Planet" for a fee of $5,000;

(2) that arrangements had already been made by K. K. Khoo of South Sumatra Shipping Co. on the instruction of Suriatna for the discharge of the rice from the "Planet" into lighters and for shipment to Indonesian ports;

(3) that the defendants are to receive a letter from South Sumatra Shipping Co. declaring themselves responsible for the transhipment of the rice; and

(4) that the defendants undertake to pay disbursements, expenses etc. in respect of the transhipment of the rice and look after the interest of the "Planet."

A document dated the 29th October, 1958, and signed by Lie Keng Hoen, a director, on behalf of the defendant company, and Aus Suriatna, a director, on behalf of the Indonesia Sugar Line states in effect:

(1) that arrangements for the discharge of the rice from the "Planet" and for shipment to Indonesian ports have been made by the Indonesia Sugar Line and are not the concern of the defendants;

(2) that the defendants are, however, to arrange for the necessary import and export permits and to be responsible for the correct declarations;

(3) that the defendants are to act as shippers for the rice shipments on behalf of the Indonesia Sugar Line;

(4) that the defendants are to be paid a commission fee of $5,000;

(5) that the defendants are to be refunded payments of on-carriage freight, advances made to the captain of the "Planet" and advances for fuel oil supplies;

(6) that the defendants are to be paid £25,000 to cover initial expenses like on-carriage freight and transhipment expenses; and

(7) that the balance of any money due to the defendants under these arrangements is to be paid by the Indonesia Sugar Line.

Goh Leh denied that he ever discussed rates and conditions of lighterage with the plaintiff. He said he saw the plaintiff for the first time on the 21st October, 1958, on a motor launch which was proceeding to the "Planet". It is not disputed that the plaintiff unloaded the rice from the "Planet" and the "Incharran" into lighters owned or hired by him and loaded the rice into coastal steamers. It is not disputed that the defendants paid the plaintiff the sum of $71,128.71 for lighterage, stevedoring, towing and sewing on bills presented to the defendants in his own name, leaving a sum of $30,711.60 claimed for demurrage unpaid. The counter-signature of K. K.

Khoo appears on the bills which were paid but not on the demurrage bills. It is said that by the agreement made between the defendants and the Indonesia Sugar Line the arrangements for lighterage were not the concern of the defendants and that the defendants were only to pay such transhipment expenses as had been certified by K. K. Khoo, who had been appointed by the Indonesia Sugar Line to make arrangements for transhipment.

It is necessary to consider now whether there were any discussions at all between Goh Leh and the plaintiff. It is important to observe that, in paragraph 6 of the defence, the defendants admit that discussions took place between the plaintiff, Suriatna, Khoo and the defendants. Goh Leh denied that he was personally involved in these discussions. The plaintiff, on the other hand, maintained that the representative of the defendants with whom he had the discussions in question was Goh Leh and no one else. I see no reason to disbelieve the plaintiff. He was subjected to a severe and prolonged cross-examination with a view to shaking his credit. He was not shaken at all and impressed me as a simple, honest and straight-forward witness. I am fully satisfied that the plaintiff discussed the terms of the contract with Goh Leh. I am fully satisfied that Goh Leh told the Court a deliberate lie when he said that he had no discussions with the plaintiff.

I accept the evidence of the plaintiff that a contract was made between him and the defendants on or about the 18th October, 1958. I find that it was not a term of the contract that the plaintiff's bills should be counter-signed by Khoo before they were presented for payment to the defendants. I find that the bills presented by the plaintiff were not counter-signed by Khoo at the time they were presented by him. Goh Leh admitted that he sent some bills back to Khoo and obtained Khoo's counter-signature after they had been presented by the plaintiff. It seems to me more probable than not that all the bills counter-signed by Khoo were so counter-signed by arrangement between Goh Leh and Khoo and without reference to the plaintiff. I must add, however, that there is no evidence that the contract between the plaintiff and the defendants was to be for three years as alleged in the statement of claim.

I come now to the next question: was it a term of the contract between the plaintiff and the defendants that demurrage was free? According to the plaintiff, Goh Leh and he agreed on or about the 18th October, 1958, that the demurrage rate should be 60 cents per ton per day. According to Goh Leh, Khoo told him on the 20th or 21st October, 1958, that the lighterage rate would be a fixed rate of just over $2.00 and and that there would be no demurrage charges. Even if this were true, I do not see how it could affect the contract between the plaintiff and the defendants. To substantiate their contention that demurrage was free, the defendants relied on the words "Free Demurrage" typed on two of the plaintiff's bills dated the 9th November and 4th December, 1958. The plaintiff's typist, Loo Choy Lan, testified that she typed those words on the bills on the instructions of Khoo. The plaintiff occupies a room on the same floor as Khoo's office at No. 74-B, Robinson Road. He does not know English. Khoo helped the plaintiff to draft bills. He had the opportunity to direct the plaintiff's typist to type those words on the bills without the plaintiff realizing what was being done. I believe the plaintiff's typist. I accept the plaintiff's statement that he was not aware that the bills contained those words. In my opinion, there was bound to be some delay before the rice unloaded from the "Planet" and "Incharran" into the plaintiff's lighters could be unloaded into coastal steamers bound for Indonesia. It seems to me glaringly improbable that any lighterage contractor would, in the circumstances, agree to demurrage being free, especially when it is borne in mind that the lighterage rate agreed between the parties is less than that set out in the regulations of the Lighter Owners' Association. I, therefore, accept the plaintiff's evidence that the demurrage rate agreed between the parties was 60 cents per ton per day.

That brings me to the third question: did the plaintiff know at the time of the making of the contract, that the defendants were contracting as agents for the Indonesia Sugar Line and Indonesia Samudera Line? The plaintiff's evidence is that he knew that the rice was destined for Indonesia but Goh Leh did not tell him that he was contracting with a firm in Indonesia; no Indonesian firm was mentioned by Goh Leh; and the plaintiff thought all the time that he was contracting with the defendants. Counsel for the defendants drew my attention to the following passage in a letter dated the 14th March, 1959, from the plaintiff's solicitors to the defendants:

> "We are informed that these bills (i.e. the bills for demurrage) were brought to your notice in December, 1958, when the work had been completed but that Mr. Khoo informed our client that he should hold back the bills until the proprietor of the Company returned from Indonesia."

I am asked to infer from this that the plaintiff knew at the time the contract was made that the defendants were agents of Indonesian principals. In my opinion, the inference may equally well be drawn that the plaintiff came to know that the defendants were agents of Indonesian principals in December, 1958. Counsel for the defendants also drew my attention to the fact that the bills submitted by the plaintiff to the defendants describe them as agents for the P. T. Indonesia Sugar Line or the P. T. Indonesia

Samudera Line. It must be borne in mind, however, that the bills are not the contract. It must also be borne in mind that the bills were drafted by Khoo and not by the plaintiff. I prefer the plaintiff's own evidence to any inference which may be drawn against him from words which were drafted by Khoo. In my opinion, the plaintiff did not know when the contract was made that the defendants were contracting with him as agents for foreign principals.

It follows from my view of the facts that the defendants, in my judgment, are personally liable upon the contract.

If, however, the plaintiff knew that the defendants were contracting as agents for foreign principals, I am of the opinion that a personal liability is imposed upon them by usage in Singapore. Evidence as to such a lighterage custom was given by S. W. Peers, Managing Director of Anglo-Dutch Lighterage Co., Singapore, and N.W. Ireson, Shipping Manager of Paterson, Simon & Co. Ltd. I accept their evidence and consider the usage reasonable.

Quite apart from the lighterage custom in Singapore, I hold that when an agent contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears. In doing so, I am following the view expressed by Pearce J. in *Rusholme Ltd.* v. *S. G. Read Ltd.*[1], and by Scrutton L.J. in *Brandt* v. *Morris.*[2] On the evidence before me, it is clear that in the present case there was no contrary intention, so far as the plaintiff was concerned.

In the result I give judgment for the plaintiff for the amount claimed with costs.

From this judgment the defendants appealed to the Court of Appeal.

COURT OF APPEAL.

H. E. Cashin for the appellant.

K. E. Hilborne for the respondent.

Buttrose J.: This was an appeal from a judgment of Ambrose J. in favour of the plaintiff for the sum of $30,711.60 for demurrage.

The action involved two consignments of rice for transhipment and the substantial issue was as to whether there was a contract for lighterage including demurrage in respect thereof between the parties. The plaintiff maintained that the defendants did enter into this contract with him while the defendants contended that they did not.

On this issue the learned trial Judge found as follows:—

"I see no reason to disbelieve the plaintiff. He was subjected to a severe and prolonged cross-examination with a view to shaking his credit. He was not shaken at all and impressed me as a simple, honest and straightforward witness. I am fully satisfied that the plaintiff discussed the terms of the contract with Goh Leh. I am fully satisfied that Goh Leh told the Court a deliberate lie when he said he had no discussions with the plaintiff. I accept the evidence of the plaintiff that a contract was made between him and the defendants on or about the 18th October, 1958."

No reasons are given as to why the learned trial Judge was fully satisfied that Goh Leh (the (Shipping Department Manager of the defendant company) told the Court a deliberate lie when he said he had no discussions with the plaintiff nor is any indication given as to what impression, if any, he formed of the witness nor as to his demeanour generally. Goh Leh was also cross-examined at considerable length but, so far as one can gather from the record, he does not appear to have been shaken.

Had the case stopped there, however, and confined itself to a question of accepting the evidence of one witness in preference to another, I should be reluctant to interfere with the trial Judge's finding of fact.

The principles applicable to a consideration by an appellate Court of findings of fact at first instance are enunciated in *Benmax* v. *Austin Motor Co. Ltd.*[3] It was there laid down that there was a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter, the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses.

The present case, in my opinion, goes far beyond the mere acceptance of the evidence of a witness because he is a credible one. The case rested not only on the trial Judge's finding of fact on his impression of the two main witnesses in the case but to a large extent it turned on inferences from proved facts and on documents. In such a case the principles to be applied are concisely stated by Lord Thankerton in *Watt* v. *Thomas*[4] at p. 488. There was here a considerable volume of independent and extrinsic evidence both oral and documentary which, in my view, supported and was consistent only with the defendants' case which was that there was no contractual relationship between the parties at all with regard to lighterage and that before the defendant company ever came into the picture, arrangements regarding the lighterage of the rice had already been made by one Khoo of South Sumatra Trading Co. with the plaintiff and the defendants had nothing whatever to do with it. The defendants were appointed agents merely to handle the clearance, on carriage and other documents in connection with the cargo of rice.

The evidence of Mr. Lambert, the Assistant Manager of the accounts department of Baretto's Shipping and Trading Co., Ltd. an independent witness and Tan Tat Chin a witness for the

plaintiff substantially confirm this. The correspondence also confirms it. The memorandum prepared by the then managing director of the defendant company setting out the arrangements made in connection with the transhipment is in entire accord with this position. It is true that this memorandum was undated and unsigned but it does, in the view I take, constitute an adequate and workmanlike document and I can see no reason whatever to doubt its authenticity. It is true that the learned trial Judge in his judgment sets out the effect of this memorandum and also the defendant company's letter of the 29th October, 1958, but he refrains from dealing with them and apparently draws no conclusions from them nor indicates what he thought of them.

The evidence of Koh Swee Gim, who was the defendants' permanent lighter contractor, was that on his enquiring from the defendant company why he was not given this lighterage job, he was told that they, the defendants, had nothing to do with the lighterage again supporting and confirming the defendants' case. Furthermore, according to Mr. Peers, a witness for the plaintiff, local shipping agents have their own lighterage contractors and would not normally employ an outside contractor. If the defendant company had been responsible for the lighterage, they would have employed their own permanent contractor Koh Swee Gim and not an outsider. Again, the question of the defendants refusing to pay lighterage bills submitted by the plaintiff unless they were countersigned by Khoo pointed to the fact that he was responsible for the lighterage and the defendants were not.

The plaintiff alleged that at the meeting when the oral contract as to the lighterage was entered into with the defendants Khoo was present. He was not called although he was closely associated with the plaintiff in the transaction, had his office almost next door to the plaintiff on the same floor and was at one time in partnership with him. While one can appreciate, in the circumstances of this case, the reluctance on the part of either side to call Khoo, it must not be over-looked that the onus of proving this oral contract lay on the plaintiff throughout and he failed to call Khoo whom he alleged was present when the contract was entered into.

There was no corroboration of the plaintiff's evidence as to what conversation took place when the contract was entered into. It rested entirely on the plaintiff's own evidence.

So far as one can gather from the judgment of the trial Judge, he failed to consider any of these matters. If he had done so, I do not see how he could possibly have arrived at the conclusion which he did, because it runs counter, not only to the oral evidence to which I have referred, but to well-nigh all the documentary evidence in the case.

In coming to this decision, I have not overlooked paragraph 6 of the defence and whatever may be the reason for the pleading being left in that form, it does not constitute any admission that a contract was in fact entered into or that demurrage was ever discussed between the parties. In this connection, it is to be noted that in paragraph 2 of the statement of claim the plaintiff pleaded a three year contract with the defendants. Not only was no attempt made to prove it but it was never even mentioned by the plaintiff in his evidence. The learned trial judge himself stated there was no evidence that the contract between the plaintiff and the defendants was to be for three years as alleged in the statement of claim.

In all the circumstances. therefore, I have come to the clear conclusion that the trial Judge was plainly wrong. In his anxiety to give the plaintiff redress from the obvious swindle of which he was the unhappy victim, the learned trial judge failed, in my view, to give sufficient or any consideration to the questions of the onus of proof, the probabilities of the case and the inferences to be drawn from the documents. That the plaintiff was swindled there can be no doubt but the defendants were in no way responsible for or concerned in it. The defendants in my judgment did not enter into any contract with the plaintiff in respect of the lighterage of these consignments of rice and the plaintiff's claim should have been dismissed with costs.

This disposes of the case and it is unnecessary to consider the other points argued and I refrain from doing so.

In the result therefore the appeal must be allowed with costs. The judgment of the Court below in favour of the plaintiff for $30,711.60 must be set aside and judgment entered for the defendants with costs. Deposit to defendants.

Tan Ah Tah and **Wee Chong Jin JJ.** concurred.

From this judgment the respondent (plaintiff) appealed to the Judicial Committee of the Privy Council.

PRIVY COUNCIL APPEAL.

J. G. Le Quesne Q.C. (*M. Gray* with him) for the appellant.

J. F. Donaldson Q.C. (*S. C. Staughton* with him) for the respondents.

The judgment of the Privy Council was delivered by,

Lord Guest: This appeal is from a decision of the Court of Appeal of the State of Singapore allowing the respondents' appeal against the judgment of Ambrose J. in the High Court of Singapore awarding the appellant $30,711.60 by

way of demurrage under a contract for the transhipment of cargoes of rice.

The appellant's evidence was that on 18th October 1958 he and Goh Leh acting on behalf of the respondents had made a verbal contract whereby the appellant was to act as the lighterage contractor of the respondents. Rates of payment for the appellant's services had been agreed, including demurrage of 60 cents per ton. It is common ground between the parties that the appellant transhipped cargoes of rice from two steamers, the "Planet" and the "Incharran" which had arrived at Singapore on 21st October and 27th November, 1958 respectively. These cargoes were ultimately bound for Indonesia on coastal steamers. The respondents paid the appellant $71,128.71 for lighterage, towing and stevedoring of these two cargoes.

Goh Leh gave evidence for the respondents denying that he had ever discussed rates and conditions of lighterage with the appellant. The respondents denied that any contract for lighterage had ever been made between them and the appellant.

In this state of the evidence Ambrose J. accepted the appellant's evidence that he and Goh Leh had made an agreement in the terms narrated. He saw no reason to disbelieve the appellant who was subjected to a severe cross-examination. The appellant, he said, impressed him as a simple, honest and straightforward witness. The trial Judge said he was satisfied that Goh Leh told a deliberate lie in saying he had no discussions with the appellant.

The Court of Appeal found that there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. Buttrose J. who delivered the judgment of the Court considered that Ambrose J. was plainly wrong in accepting the appellants' evidence.

It is apparent from an examination of the evidence that there is a direct conflict of evidence between the appellant and Goh Leh. The possibility of a misunderstanding is eliminated by the fact that Goh Leh denied having any discussion with the appellant about lighterage. One or other of these two witnesses must be lying. The trial Judge who saw and heard the witnesses has reached the conclusion that it was Goh Leh who was untruthful and that the appellant was telling the truth.

There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas* v. *Thomas* [4] at page 487.

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses. and the matter will then become at large for the appellate court."

Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke* v. *Edinburgh & District Tramways Co. Ltd.* [5]

"In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

Before the Court of Appeal in Singapore was entitled to reject the trial Judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial Judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

Before dealing with the judgment of the Court of Appeal it is necessary to dispose of a point, not taken so far as appears from the judgment before the Court of Appeal, but argued by the respondents' counsel before the Board. He suggested that by reason of inconsistencies and discrepancies in the appellant's evidence the trial Judge ought not to have accepted him as a credible witness. Without elaborating the criticisms made by respondents' counsel it is sufficient to say that their Lordships are not satisfied that any of these inconsistencies were of a material character or that taken either individually or collectively they indicated that the appellant was not an honest witness. The appellant's memory on occasions may have been at fault, but any minor inconsistencies there may have been appeared on the face of the appellant's evidence and these are the very matters which the trial Judge must have taken into account when assessing the credibility of the witness's evidence.

Before returning to the judgment of the Court of Appeal it will be convenient to narrate the appellant's and respondents' evidence in some detail.

The appellant is a lighterage contractor in Singapore having been on his own from May

1958. He was introduced to the respondents by one Khoo and he met Goh Leh the respondents' shipping manager on a date which was probably October 18th 1958. He gave a detailed account of the discussion as to lighterage during which terms were agreed between him and Goh Leh for lighterage charges including 60 cents per ton for demurrage. Khoo and an Indonesian were present at the meeting. The first vessel the "Planet" came in on 21st October 1958 and he carried out the work from 22nd October on this vessel and subsequently on the "Incharran" which arrived on 27th November. Demurrage arose on these cargoes because ships were not available for Indonesia when the incoming ships arrived. He drew up the bills for demurrage and signed them and left them at the respondents' office, one in November 1958, one in January 1959 and one in March 1959. These bills have not been paid. The accounts for lighterage on the "Planet" and the "Incharran" have been paid by the respondents. The bills on on the "Planet" were all paid by 12th December and the bills on the "Incharran" by 16th December 1958. On two of the bills, one for the "Planet" and one for the "Incharran" rendered by the appellant to the respondents for lighterage charges appear the words "Free Demurrage". The appellant who did not understand English explained that he asked Khoo to give the appellant's typist the draft to type. The trial Judge accepted the typist's evidence that she typed these words on the bills on the instructions of Khoo and that the appellant was not aware that these words were on the bills when he signed them. Khoo who occupied an office in the same building as the appellant was paid a commission of 20 cents per ton in consideration of his recommendation of the appellant to the respondents.

There was no corroboration of the appellant's evidence of the agreement between him and Goh Leh. Other lighterage contractors, however, gave evidence that they have never heard of free demurrage and that demurrage was bound to arise on such lighterage contracts.

In his evidence for the respondents Goh Leh, their shipping manager said that his company only handled the husbanding in relation to the "Planet" and the "Incharran". The stevedoring, lighterage and on carriage were in the hands of Khoo of the South Sumatra Shipping Co. on behalf of the Indonesia Sugar Line and the Indonesia Samudera Line. He produced a memorandum undated and unsigned which he said contained the instructions given to him by his managing director, Mr. Haalebos. These were that his company were to act as husbanding agents for the "Planet", and that Khoo had arranged with Mr. Aus Suriatna of the Indonesia Samudera Line and the Indonesia Sugar Line for the discharge of rice into lighters and for the on-carriage. He denied taking part in any discussions with the appellant or Khoo or Suriatna in regard to lighterage charges. He first met the appellant on 21st October on a motor launch proceeding to the "Planet". He says that Khoo gave him to understand that there would be no demurrage charges and he further stated that the demurrage bills were never presented to him for payment by the appellant. Khoo was making a profit of $4 per ton on the on freight of $18. The first he knew of these bills was when they were rendered to the respondents by the appellant's solicitor in January 1959.

The Court of Appeal found that the trial Judge's view of the appellant's evidence could not be accepted having regard to certain documents which they considered supported the evidence of Goh Leh and were consistent only with the respondents' case.

A number of the documents to which the Court of Appeal referred were said to be documents which were inadmissible in evidence as being hearsay but which had been tendered by the respondents at the trial without objection by the appellant. The appellant's counsel submitted to the Board that as these documents were inadmissible as hearsay evidence, the Court of Appeal were not entitled to place any reliance on them. Reference was made to *Jacker* v. *International Cable Company Limited.*[6] The mere failure of a party to object to evidence tendered cannot convert inadmissible evidence into legal evidence, but a party may by his conduct at the trial be precluded from objecting to such evidence (*Gilbert* v. *Endean*).[7] In the circumstances of the present case their Lordships feel unable to say that the documents to which objection was taken before the Board were not material to which the Court of Appeal was entitled to have regard.

The documents particularly relied upon by the Court of Appeal were the undated and unsigned memorandum by Mr. Haalebos to Goh Leh already referred to and a letter dated 29th October 1958 from the respondents to Aus Suriatna in which the respondents part in the handling of the "Planet" was confirmed. These documents afforded some support to the respondents' case that a contract had been made between the respondents and the owners in regard to the handling of the cargo, but they are by no means inconsistent with a contract having been made between Goh Leh for the respondents and the appellant or with some private arrangement between Goh Leh and the appellant on the terms stated by the latter.

The Court of Appeal also placed reliance on the evidence of Mr. Lambert and Tan Yat Chin as being consistent only with the respondents'

case. Mr. Lambert of the Barretto Shipping & Trading Co. said he was approached by Mr. Aus Suriatna of the Indonesia Sugar Line and the Indonesia Samudera Line to handle the cargo of rice from the "Planet". However, owing to the fact that his company was not put in funds by the owners before the arrival of the "Planet" nothing came of the matter. This had no possible bearing on any subsequent arrangement between the appellant and Goh Leh. Tan Yat Chin who worked for the appellant as a clerk on the "Planet" and "Incharran" spoke to having discussed tally clerks on board the ship with Goh Leh. He rendered his bills to and was paid by the respondents. So far from this witness's evidence being consistent only with the respondents' case, it appears to their Lordships to give some support to the appellant's evidence that Goh Leh did concern himself with the lighterage contract to his own evidence.

Respondents' counsel presented an elaborate reconstruction of the history of the case in which Khoo prominently figured as the villain of the piece. He was not disposed to argue that Khoo did not make a contract with the appellant for the lighterage in regard to both vessels, a contract which, he conceded, probably included demurrage. He proceeded, however, to suggest that Khoo had deceived the respondents into thinking that the contract was "Free Demurrage" by having these words typed in after the appellant had signed the bills. His motive in doing so is not clear, but it may have been to retain his profit on the on-carriage. If this, however, is what happened and Khoo was acting on behalf of the owners in employing the appellant it is difficult to understand why the appellant did not sue Khoo and/or the owners. He would have had a stronger case against these defendants as he would have obtained corroboration from the bill heads which included the names of the owners. The explanation suggested for his not suing the owners that the companies were registered in Indonesia is not convincing. This reconstruction of the history is however in the absence of Khoo from the witness-box pure speculation. No criticism can certainly be made of the appellant for his failure to call Khoo as a witness, if he had as suggested swindled the appellant.

A number of difficulties undoubtedly arise on the presentation of the case both from the appellant's and the respondents' point of view. It may be that the whole truth has not been disclosed. But in that state of affairs with two possible explanations, the safest course is in their Lordships' view to accept the trial Judge's estimate of the credibility of the two witnesses, the appellant and Goh Leh. If this be the correct view, it becomes necessary to consider how far the appellant's evidence will carry him.

The conclusion arrived at by the Court of Appeal was to a large extent based on the view that they were entitled to interfere with the trial Judge's findings because these were inferences drawn from the facts rather than the findings of specific facts. An appellate tribunal will more readily interfere with the trial Judge's decision on the former than on the latter (see *Benmax* v. *Austin Motor Co. Ltd.*).[3] In so far, however, as the trial Judge's decision was based on the credibility of the appellant and Goh Leh this was the finding of the specific fact that an agreement was reached between them, thus depending on the evaluation of their evidence as witnesses. It may be that the Court of Appeal's acceptance of the evidence of Goh Leh depended on inferences from documents, but these inferences are not sufficient in their Lordships' opinion to reinstate Goh Leh as a reliable witness in face of the trial Judge's deliberate refusal to accept this evidence as truthful. If the appellant is an honest witness whose evidence must be accepted, this would establish that a contract was made between him and Goh Leh for lighterage charges which included demurrage. Respondents' counsel conceded that in these circumstances the personal liability of the respondents was involved.

Upon the whole matter their Lordships have reached the conclusion that there was not sufficient material before the Court of Appeal to entitle them to reject the result arrived at by the trial Judge.

They will accordingly report to the Head of Malaysia their opinion that the appeal should be allowed with costs in the Court of Appeal and the judgment of Ambrose J. dated 28th May 1960 restored, and that the respondents should pay the costs of this appeal. The appellant having been granted leave to prosecute his appeal *in forma pauperis* these costs should be taxed upon the pauper scale.

Solicitors: *Coward, Chance & Co.*; *E. F. Turner & Sons.*

PUI MIAW v. BONG KEE MAN

[A.C.J. (Harley J.) January 15, 1964]

[Kuching — Civil Appeal No. A/12 of 1963]

Contract—Broker claiming agreed remuneration on abortive sale—Part satisfaction—Claim of balance—Plea of non est factum duress and illegality by proposed vendor—(Sarawak) Trade Licences Ordinance (Cap. 33) —Definition of broker—Object of Ordinance—Collection of revenue.

The appellant asked the respondent who was a grocer to find a buyer for the appellant's two pieces of land. The appellant gave the respondent the documents of title relating to the lands and also a written authorisation to sell the lands at $90,000. About 10 days later the respondent found a prospective purchaser but the appellant refused to accept a deposit on the